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No. 528

In the Supreme Court of the United States

OCTOBER TERM, 1967

MARION J. BERGUIDO, ET AL., PETITIONERS

v.

EASTERN AIRLINES, INCORPORATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

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MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

This memorandum is submitted in response to the Court's order of November 13, 1967, inviting the Solicitor General to express the views of the United States.

On December 21, 1955, an Eastern Airlines flight, on which Carlos Berguido was returning to Philadelphia after a trip to San Salvador, crashed while attempting to land at Jacksonville, Florida. Petitioners sued Eastern to recover for Mr. Berguido's death in that accident. Eastern asserted that Mr. Berguido's flight constituted "international transportation" within the

meaning of Article 1(1) and (2) of the Warsaw Convention,[1] and, therefore, that its liability to petitioners was limited by the terms of that Convention to approximately $8,300. Petitioners, however, refused the tender of that sum.

After a number of abortive proceedings,[2] the parties agreed to a trial to the district court without a jury. In its opinion,[3] the trial court found that the fatal flight was an "international" one within the meaning of the Warsaw Convention (Resp. App. 24).[4]

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[1] Formally titled, "Convention for the Unification of Certain Rules Relating to International Transportation by Air," but commonly referred to by the name of the city in which it was concluded on October 12, 1929. It was adhered to by the United States in 1934, 49 Stat. 3000; T.S. No. 876. The relevant portions of the Convention are set forth in the Appendix to this memorandum, *infra*, pp. 14-16.

[2] There were four prior trials in this case, each of which was set aside on grounds not relevant here, and at least one full-dress appeal on a collateral point. See, *Berguido* v. *Eastern Air Lines, Incorporated*, 317 F.2d 628 (C.A. 3, 1963), rehearing denied, 317 F.2d 633, certiorari denied, 375 U.S. 895; and *Berguido* v. *Eastern Air Lines, Incorporated*, 35 F.R.D. 200 (E.D. Pa., 1964). See, also, the decision of the court of appeals from which certiorari is sought, *Berguido* v. *Eastern Air Lines, Incorporated*, 369 F.2d 874, 875, nn.3-6 (Pet. App. 64).

[3] The parties apparently "waived" the requirement of Rule 52(a) of the Federal Rules of Civil Procedure, that the court make specific findings of fact and conclusions of law. See Appendix A to Eastern's Brief in Opposition to certiorari, p. 23.

[4] "Pet. App." refers to the appendix to the Petition for Certiorari, "Resp. App." to the appendix to Eastern's Brief in Opposition, and "Reply App." to the appendix to petitioners' Reply Brief.

For this reason the court held that Eastern's liability to petitioners was limited to the $8,300 tendered, unless petitioners sustained the burden of proving that the accident was caused by the "willful misconduct" of Eastern or its employees, which under Article 25 of the Convention (*infra*, p. 16) would lift the limitation (Resp. App. 25). After reviewing the evidence, the district court concluded that the preponderance of evidence did not establish that "willful misconduct, negligence or fault on the part of" Eastern or its crew had caused the crash (Resp. App. 27). It therefore held petitioners "entitled to recover against [Eastern] only as limited by the Warsaw Convention in the amount of $8,300, the sum previously tendered * * *" (Resp. App. 30). It would appear that the question of the applicability of the Convention related only to whether the abortive Miami-to-Washington-to-Philadelphia leg of the journey was "international transportation" within the meaning of Article 1(2) of the Convention. Thus, the district court's opinion makes no mention of any dispute between the parties as to whether the passenger ticket that Eastern provided to Mr. Berguido satisfied the requirements of the Warsaw Convention.

When petitioners appealed to the Third Circuit, they urged, *inter alia*, that the Warsaw Convention made Eastern absolutely liable for injuries to its passengers occurring on international flights, and that, because Eastern had accepted Mr. Berguido as a passenger on such a flight without giving him a ticket meeting the requirements of the Convention, the airline could not invoke the Convention's provisions lim-

iting its liability to $8,300. In pertinent part, Article 3(1) of the Warsaw Convention provides (49 Stat. 3015):

> For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
>
> * * * *
>
> (c) The agreed stopping places, * * *;
>
> * * * *
>
> (e) A statement that the transportation is subject to the rules relating to liability established by this convention.

Article 3(2) further provides (*ibid.*):

> The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. *Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.* [Emphasis added.]

In substance, petitioners contended both that Eastern's ticket failed to set out all the agreed stopping places (it omitted Jacksonville, for one) as required by Article 3(1)(c) of the Convention, and that the statement on the ticket that the flight was subject to the Warsaw Convention was printed in language too vague and in type too small to constitute compliance with Article 3(1)(e).

Eastern responded that petitioners were precluded from raising on appeal an issue as to the adequacy of the ticket because they had failed to raise it in the trial court and, indeed, had eliminated it from the case.[5] It was for this reason, Eastern asserted, the district court had made no findings on the adequacy of the ticket and Eastern had not attempted to show that Mr. Berguido, an attorney specializing in international law, not only had actual notice of the Convention's application to his flight but in fact had purchased flight insurance before the ill-fated trip.[6]

On November 23, 1966, a divided court of appeals affirmed the judgment. *Berguido* v. *Eastern Air Lines, Incorporated*, 369 F.2d 874 (Pet. App. 63-86). The majority found it unnecessary to reach the ticket issue. Instead, they read the Warsaw Convention as imposing absolute liability for passenger injuries on international air carriers up to $8,300 and additional monetary liability if the plaintiff could show that the carrier's "wilful misconduct" contributed to the accident; but where the carrier failed to deliver a passenger ticket, plaintiff was only required to prove negligence on the carrier's part to recover damages in excess of $8,300. Holding that the findings of the trial court that petitioners had failed to prove either negligence or wilful misconduct were not "clearly erroneous," the court of appeals determined that it need not pass upon the contentions that Eastern had failed

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[5] See Brief in Opposition, p. 9.

[6] See Brief in Opposition, pp. 12-13, n.9.

to deliver an adequate ticket or that—as Eastern asserted—petitioners had waived that argument at trial.

Circuit Judge Kalodner dissented. His principal concern was that a new trial should have been granted because the findings on negligence were internally inconsistent and in significant part clearly erroneous. Although he noted that only part of the ticket was in evidence (369 F. 2d at 885, n. 11, Pet. App. 84), Judge Kalodner expressed his opinion that the notice referring to the Warsaw Convention appearing on the part of the ticket that was in the record was similar to the notice found inadequate in *Lisi* v. *Alitalia-Linee Aeree Italiane*, 253 F. Supp. 237 (S.D.N.Y.), and that he agreed with the holding in that case.

Petitioners' motion for rehearing *en banc* was denied by a vote of 6-2 (Pet. App. 62), Judge Kalodner, joined by Chief Judge Staley, voting for rehearing on the ground that the majority's decision conflicted with *Lisi* v. *Alitalia-Aeree Italiane*, 370 F.2d 508 (C.A. 2), certiorari granted, November 6, 1967, No. 70, this Term (Pet. App. 58).

DISCUSSION

In our view, the Court of Appeals for the Third Circuit has misread the Warsaw Convention. It does not follow automatically, however, that the court erred in affirming the district court's award of $8,300 to petitioners. Moreover, the rather confused and incomplete state of the record in this case on the questions presented in *Lisi* suggests that it would not

be conducive to a resolution of the issues in *Lisi* to accord the instant case plenary consideration. We suggest, for the reasons explained below, that action on the present petition for a writ of certiorari should be deferred until *Lisi* is decided on the merits.

1. The Warsaw Convention provides that an air carrier "shall be liable" for bodily injury or death occurring to a passenger while on board the carrier's aircraft (Art. 17) unless the carrier "proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible * * * to take such measures" (Art. 20(1)), or "that the damage was caused by or contributed to by the negligence of the injured person * * *" (Art. 21). Thus, the Convention makes negligence the predicate of liability, but conclusively presumes such negligence unless the carrier meets the burden of proving to the contrary; that is, the carrier can exonerate itself if it can show that it had taken all necessary measures to avoid the injury or that it was impossible to do so.[7]

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[7] *Noel* v. *Linea Aeropostal Venezolana*, 247 F. 2d 677, 679 (C.A. 2), certiorari denied, 355 U.S. 907; *Grey* v. *American Airlines*, 227 F. 2d 282, 285 (C.A. 2), certiorari denied, 350 U.S. 989; *Komlos* v. *Compagnie Nationale Air France*, 111 F. Supp. 393, 401 (S.D. N.Y.), reversed on other grounds, 209 F. 2d 436 (C.A. 2), certiorari denied, 348 U.S. 820. In his message transmitting the Warsaw Convention to the Senate for ratification, then Secretary of State Hull noted:

> The principle of placing the burden on the carrier to show lack of negligence in international air transportation in order to escape liability, seems to be reasonable in view of the difficulty which a passenger has in establishing the cause of an accident in air transportation.

Senate Committee on Foreign Relations, *Message from the*

However, if the carrier fails to shoulder this burden, and is thus automatically liable, the amount of its liability for an individual injury or death is—without more—limited by the Convention to approximately $8,300 (Art. 22(1)).

There are occasions, however, when the Convention precludes a carrier from invoking the limitation of liability for passenger injuries; in such cases full damages are recoverable. One of these exceptions—alleged by petitioners throughout—is where the injury was caused by the carriers' "wilful misconduct" (Art. 25(1)). As petitioners appear to recognize (Pet. 34-49), the burden of precluding reliance on the limitation of liability, by showing "wilful misconduct," rests on a claimant. See *LeRoy* v. *Sabena Belgian World Airlines*, 344 F.2d 266 (C.A. 2), certiorari denied, 382 U.S. 878; *KLM* v. *Tuller*, 292 F.2d 775 (C.A.D.C.), certiorari denied, 368 U.S. 921; *Grey* v. *American Airlines*, *supra*, 227 F.2d at 285.

In addition, a carrier's liability is not limited by the Convention if it has failed to comply with the requirements of Article 3 that it deliver a passenger ticket giving notice that the flight is subject to the Convention's rules limiting liability. This condition has been construed to have been violated when the carrier delivers the ticket too late for the passenger

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President of the United States Transmitting a Convention for the Unification of Certain Rules, S. Exec. Doc. No. G, 73d Cong., 2d Sess. 4 (1934). See, also, Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 500, 519-522 (1967).

to obtain insurance or other financial protection, *Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851, 856 (C.A. 2), certiorari denied, 382 U.S. 816; *Warren* v. *Flying Tiger Line, Inc.*, 352 F.2d 494, 497 (C.A. 9); or when the required statement is printed on the ticket in such a manner as to be so unnoticeable and illegible as to fail to satisfy the purpose of Article 3, *Lisi* v. *Alitalia-Linee Aeree Italiane*, 370 F.2d 508 (C.A. 2), certiorari granted, November 6, 1967, No. 70, this Term.

Thus, insofar as the opinion below suggests that a carrier's failure to provide a passenger ticket satisfying the requirements of Article 3 merely permits recovery in excess of $8,300 if a claimant proves ordinary negligence instead of "wilful misconduct" (Pet. App. 71), it is incorrect. As the authorities cited make clear, acceptance of a passenger without providing a proper ticket does not disturb the presumptive liability imposed on air carriers by the Convention; the claimant still bears no burden of proving negligence. Rather, the effect of the failure of the carrier to deliver a ticket in accordance with Article 3 is to bar the carrier's right to avail itself of the Convention provisions limiting liability to $8,300 per passenger. Consequently, if a claimant proves that a carrier has defaulted on its Article 3 obligations, the carrier can be held liable for actual damages unless it shows that it took all appropriate measures to avoid the injury.

2. It does not follow from the foregoing, however, that the *judgment* of the court of appeals in this case

was necessarily incorrect, or that this Court should review these proceedings. Petitioners' right to recover damages in an amount unlimited by the Convention depends upon a *factual* showing that Eastern accepted Mr. Berguido as a passenger without giving him a ticket that was adequate under Article 3.[8] The district court made no finding on this issue; both the majority (Pet. App. 72) and the dissenting judges (Pet. App. 84-85) in the court of appeals expressly declined to pass on the correctness of petitioners' factual assertions on this point. If Eastern is correct in arguing, as it did below, that at trial petitioners waived any claim to recovery based on non-delivery of a proper ticket under Article 3, then the Third Circuit's affirmance of the district court's award of $8,300 in damages to petitioners is correct, notwithstanding that court's erroneous understanding of the workings of the Warsaw Convention.[9]

We are unable to determine from the papers avail-

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[8] There is no question as to Eastern's liability, since it voluntarily tendered $8,300 in damages to petitioners and did not appeal from the district court's judgment for that sum. The only issue presented here is whether Eastern is entitled to limit its liability to that figure by virtue of the Warsaw Convention.

There is also no longer any dispute that the flight in question is covered by the Warsaw Convention (Pet. App. 69).

[9] Whether or not there is merit to the position of the dissenting judges below (Pet. App. 58, 82-83) that the award of $8,300 to petitioners is inconsistent with the district judge's suggestion that Eastern might not have been negligent at all, Eastern did not cross-appeal and has not cross-petitioned to urge that under Article 20(1) this finding precludes imposition of any liability.

able to us whether petitioners did waive this point.[10] In fact, petitioners candidly concede that not at least until their reply brief filed in the court below did they happen on their present legal theory (See Reply Brief in this Court, Ex. A, pp. 2, 4, 8). In any event, whether or not petitioners have formally waived this contention, we think it plain that the present state of the record provides an insufficient basis for determining whether Eastern failed to deliver an adequate ticket to Mr. Berguido and for this reason may not limit its liability to $8,300. To begin with, only one segment of the ticket is in the record.[11] Additionally, Eastern asserts in its Opposition that the late Mr. Berguido was an attorney specializing in international law, that he was in fact fully aware of the Convention's provisions limiting a carrier's liability, and that he even purchased flight insurance concurrently with the tickets in question.[12] This, too, is not a matter of record,[13] although petitioners do not controvert these assertions in their papers in this Court.

For the reasons given in our memorandum as *amicus curiae* in *Lisi, supra*, it is our position that a

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[10] We do note, however, that, aside from the decision below, none of the other reported decisions in this litigation make the slightest reference to the adequacy of the ticket delivered to Mr. Berguido. See the reports of *Berguido* v. *Eastern Air Lines, Incorporated*, at 317 F. 2d 628; 35 F.R.D. 200; and Resp. App. 23-30. See, also, petitioners' Reply Brief, p. 4.

[11] See Pet. App. 84, n. 11.

[12] See Brief in Opposition, pp. 12-13, n. 9.

[13] Eastern asserts it did not endeavor to establish these points at the latest trial in this case because it was led to believe that petitioners were not raising the ticket issue. *Ibid.*

ticket warning couched in type too small to attract reasonable notice is not of itself adequate compliance with Article 3 of the Convention. But where such a legend does *in fact* adequately inform a prospective passenger of the Convention's limitations on air carrier liability, there may be considerations justifying the limitation on liability that are not present in *Lisi*. We note particularly that there is general agreement among the circuits that the purpose of Article 3 is simply to give passengers sufficient warning to enable them, if they wish, to make other arrangements for financial protection. See *Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851, 856 (C.A. 2), certiorari denied, 382 U.S. 816; *Warren* v. *Flying Tiger Line, Inc.*, 352 F.2d 494, 497 (C.A. 9); cf. *Seth* v. *British Overseas Airways Corp.*, 329 F.2d 302, 307 (C.A. 1), certiorari denied, 379 U.S. 858. We conclude that this record does not fairly raise the issues presented in *Lisi*. It is true, to be sure—assuming that *Lisi* correctly decided that delivery of a ticket with an inadequate notice precludes limitation of liability—that the question whether actual notice cures this defect becomes significant. But we believe that this case, at least in its present posture, is not an appropriate vehicle for deciding that issue either, since it lacks both record foundation for the claim and pertinent exploration by the lower courts.

CONCLUSION

In the circumstances, we suggest that, instead of acting on the petition at this point, this Court might hold the case pending resolution of *Lisi* v. *Alitalia*,

supra. If the Court agrees with the Second Circuit's conclusions in *Lisi*, it would appear appropriate to remand the instant case for reconsideration in light of that decision, with additional instructions to determine whether petitioners have waived any claims based on the adequacy of respondent's tickets and whether Eastern has additional grounds entitling it to limit its liability under the Convention. If this Court should reverse *Lisi*, the present petition should be denied.[14]

Respectfully submitted.

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DECEMBER 1967.

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[14] The remaining issues raised by the petition do not merit a grant of certiorari. First, as to the omission of agreed-upon stopping places from the ticket, there is no serious question but that this is not a material violation of Article 3 of the Warsaw Convention where the ticket plainly indicates—as did the one in question—that the flight is an international one. See, *Grey* v. *American Airlines*, 95 F. Supp. 756 (S.D. N.Y.), affirmed as to this point on the opinion of the district court, 227 F. 2d 282 (C.A. 2), certiorari denied, 350 U.S. 989; *Lisi* v. *Alitalia*, *supra*, 370 F. 2d at 513, n. 8. Second, both courts below agreed that the accident in suit was not caused by Eastern's "wilful misconduct". The correctness of these concurrent factual findings is not an issue meriting re-examination by this Court. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636; *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

APPENDIX

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, the Warsaw Convention, 49 Stat. 3000, *et seq.*, provides in pertinent part:

Article 1:

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this Convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

* * * *

Article 3:

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

Article 17:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 20:

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

* * * * *

Article 22:

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

* * * * *

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Article 25:

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

* * * * *

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